No. 12,429

IN THE

United States Court of Appeals

For the Ninth Circuit

HUDSON LUMBER COMPANY (a corporation), and ELKINS SAWMILL INCORPORATED,

Appellants,

vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

STATEMENT DISCLOSING BASIS OF JURISDICTION OF DISTRICT COURT AND OF CIRCUIT COURT OF APPEALS.

A. Facts as disclosed by pleadings and record, which are the basis of jurisdiction.

1. Plaintiff Hudson Lumber Company is a corporation organized and existing under the laws of Delaware; plaintiff Elkins Sawmill Incorporated, under the laws of California; defendant United States Plywood Corporation, under the laws of New York;

and defendant Shasta Plywood, Inc., under the laws of Nevada. (Petition for Removal of Civil Action, paragraphs I and II, Transcript of Record, pages 3 and 4; Complaint, paragraphs I, II, III and IV, Transcript of Record, pages 9 and 10.)

2. This is a civil action for a declaratory judgment and injunction, and the matter in controversy, at the commencement of said action and at the present time, exceeds the sum or value of three thousand ($3,000.00) dollars, exclusive of interest and costs. (Petition for Removal of Civil Action, paragraph II, Transcript of Record, page 3; Complaint, paragraphs XI and XII, Transcript of Record, page 14.)

3. The portion of the Order of the District Court for the Northern District of California, appealed from, which stays the action pending arbitration between the parties is a "final decision" precluding appellants from the judicial remedies of declaratory relief and injunction and relegating them to the sole remedy of arbitration process (in which event Title 28, U.S.C.A., Section 1291 supports the appellate jurisdiction of the Circuit Court of Appeals); or it is an "interlocutory order" granting an injunction, under the principle announced in *Enelow v. N. Y. Life Insurance Co.* (1935) 293 U.S. 379, 79 L. ed. 440, 55 Sup. Ct. 310, and as reannounced with respect to arbitration proceedings in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.* (1935) 293 U.S. 449, 79 L. ed. 583, 55 Sup. Ct. 313; in which latter event the appellate jurisdiction is supported by Title 28, U.S.C.A., Section 1292(1).

B. Statutory provisions believed to sustain the jurisdiction.

1. Title 28, U.S.C.A., Section 1332, subdivision (a)(1):

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between:

(1) Citizens of different States;"

2. (a) Title 28, U.S.C.A., Section 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

(b) Or, in the alternative: Title 28, U.S.C.A., Section 1292(1)

"The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court".

STATEMENT OF THE CASE.

A. The question.

Where parties to a contract for the sale of incense cedar logs dispute its meaning as to the computation of the price, and the purchaser sues for declaratory relief and to enjoin the seller from cancelling the con-

tract, or from bringing other actions, or attempting to arbitrate, alleging that the purchaser faces the dilemma of either paying the substantially larger sums claimed by seller or running the risk that seller will cancel or refuse performance, to purchaser's irreparable injury, on the claim that purchaser has breached the contract: Was the District Court right in staying the action pending arbitration, on the basis of the contract provision requiring arbitration of all disputes thereunder, but further providing that "nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement"?

B. How the case arises.

The appellants (plaintiffs in the District Court), as buyer and successor in interest to buyer, respectively, are engaged in a controversy with the appellees (defendants in the District Court), as seller and successor in interest to seller, respectively, concerning the interpretation of that portion of a contract between them relating to the method of determining the cost of cedar logs, for the purchase and sale of which the contract was made.

(Contract, paragraph 3(a)(vi); Transcript of Record, page 23.)

The contract in question contains a provision requiring arbitration of any disagreements or differences thereunder, in the manner provided, but qualifies such provision in the following language:

"* * * but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

(Contract, paragraph 10, Transcript of Record, page 29.)

Appellants have contended throughout, and now contend, that they seek in this action, among other things, "injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement", squarely within the above quoted saving clause of the arbitration provision, in that: they ask the Court to enjoin appellees, among other things, from cancelling or attempting to cancel or declare forfeit the rights of appellants under the contract by reason of appellees' contention that appellants are in default under appellees' construction thereof. It is alleged in addition as a basis for injunctive relief, that unless the rights and duties of the parties are declared, appellants will be harassed by multiplicity of actions and proceedings, including arbitration proceedings, actions to forfeit appellants' rights, actions to recover money under the contract, actions for damages, and incidental controversies and litigation over tax liability that will hinge on the determination of the dispute. It is further shown that by threatening insistence on arbitration proceedings to settle the controversy appellees seek to deprive appellants of the right expressly reserved to the parties in the contract, to seek injunctive relief to prevent irreparable injury by reason of a claimed breach of the contract. (See Complaint,

paragraphs XIV and XV, and the prayer thereof, Transcript of Record, pages 15 to 18.)

The action having been removed to the District Court from the California Superior Court (Alameda County) where it had been commenced (Transcript of Record, pages 2 to 36) the defendants moved in the District Court for an order dismissing the action, or in the alternative, for an order staying the action, on the ground that the contract provided for arbitration of disputes, and that arbitration had not been had. (Transcript of Record, pages 37 to 43.)

After hearing and submission of the alternative motions to dismiss or stay, the District Court denied the motion to dismiss, but granted the motion to stay, "pending arbitration by the parties in accordance with the provisions of the contract in dispute", as the Order expressed it. (Transcript of Record, page 52.)

This appeal is taken from the portion of said Order granting the motion to stay the action.

SPECIFICATION OF ERRORS RELIED UPON.

Appellants contend that the District Court erred in granting the motion to stay the action pending arbitration, in that:

1. Such stay deprives the appellants of the right, expressly reserved in the arbitration provision of the contract, to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the contract; and in that:

2. The issues involved in this action are not "referable to arbitration under an agreement in writing for such arbitration" within the provisions of Title 9, U.S.C.A., Section 3, because the arbitration provision saves to the parties the right to seek "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the contract; and in that:

3. This action is brought seeking "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the contract, because:

(a) Unless appellants continue to pay the substantially larger sums demanded by appellees, appellants fear that appellees will purport to cancel or refuse performance, contending that appellants have breached the contract; and

(b) Such cancellation or refusal of performance would, if appellees are wrong in their construction of the contract, constitute a breach of the contract on their part by appellees and would cause irreparable injury to appellants; and

(c) Cancellation or refusal of performance under such circumstances by appellees will cause the loss of a substantial investment and an assured supply of cedar timber; damages would be difficult to ascertain, and inadequate; and multiplicity of actions and proceedings may result unless the relief sought by appellants is granted; all to appellants' irreparable injury; and

(d) The actions for "injunctive relief" excluded by the contract from the arbitration pro-

visions include the usual equitable remedies of mandatory or prohibitive injunction and declaratory relief incidental thereto;

and the District Court further erred in granting said stay in that:

4. The appellees have waived whatever right they may have claimed to insist upon prior arbitration as a condition precedent to this litigation.

ARGUMENT.

SUMMARY OF POINTS.

The stay of proceedings granted by the District Court was not warranted unless the issues involved are "referable to arbitration under an agreement in writing for such arbitration". Here, there is an agreement in writing providing for arbitration of "any disagreement"; but this general provision is qualified by an apparently inconsistent saving clause, reserving to the parties the right to "injunctive relief to prevent irreparable injury by reason of a claimed breach" of the agreement. Arbitration being a remedial question, the arbitration provision is governed by the federal law; but it is necessary to consider it in the light of the substantive rights of the parties, which are governed by California law. The apparently inconsistent clauses of the arbitration provision must be reconciled and both given effect if that is reasonably possible. In doing this resort may be had to the intention of the parties as disclosed by their negotia-

tions leading to the contract. So doing, it is the fair and reasonable construction of the whole arbitration provision, that any controversy involving a question of law or a mixed question of law and fact, such as interpretation of the contract, directly involving forfeiture of the rights under the contract, and consequent irreparable injury, was reserved for action in a court of equity; while the general arbitration clause referred rather to determination of disputed facts in the light of which there would be no controversy or doubt as to the meaning of the contract or the rights of the parties—that is, the "arbitration" referred to is in the nature of mere "appraisal" or "measurement" or other fact finding. The issues in this case, involving legal questions and an interpretation of the meaning of the contract, and the right to an injunction against unwarranted repudiation of the contract, fall within the first category of matters reserved to actions for "injunctive relief to prevent irreparable injury by reason of a claimed breach", and are not arbitrable. Hence the issues here are not "referable to arbitration", and the stay was unwarranted. The Court, if it entertains the action to enjoin such repudiation, can give all incidental relief proper, including declaratory relief and injunction against attempts to compel unwarranted arbitration.

Furthermore, even if there had been an original right to compel arbitration of the issues here involved, appellees, by conduct inconsistent with arbitration, have waived whatever right they may have had to it.

THE FACTS.

As disclosed by the complaint (which sets forth the contract between the parties as an exhibit) and the affidavits in the record, the facts before the District Court are as follows:

1. The price to be paid by the appellants to the appellees for the cedar logs purchased is based upon the "cost" of the logs, which "cost" includes, among other items, the actual logging cost of falling, bucking, yarding, loading, sorting, scaling and transporting logs to Anderson, California, or such other place near Anderson as appellant Hudson Lumber Company may direct. (Contract, paragraph 3 (a)(ii); Transcript of Record, page 22.)

2. Such logging costs shall be computed on a "common cost per thousand feet for all species of logs" derived from the timber tract, and this "common cost" will be the cost per thousand feet of the cedar logs. (Contract, paragraph 3 (a)(vi); Transcript of Record, page 23.)

3. The controversy between the parties revolves about the point whether this "common cost" of all species should be computed on the *net* scale of all the logs of all species, *after* deduction and allowance for visible defects (as appellants contend); or whether it should be computed on the *gross* scale of all the logs of all species, *before* deduction and allowance for visible defects (as appellees contend). (Complaint, paragraph XI; Transcript of Record, page 14.)

4. These differing formulae for computing "common cost" make a substantial difference in the cost of the cedar logs, because ordinarily the different species of logs have a different percentage or portion of visible defects. Cedar logs have a higher percentage of such defects than other species. Therefore, the percentage or portion of usable wood derived from cedar logs is less than that derived from other species. It follows that any given total amount of logging costs spread as a "common cost" over all species, will bear less heavily on the cedar logs if the quantity of wood in all the logs of all species is measured *after* deduction and allowance for visible defects, than if such quantity is measured *before* such deduction and allowance is made (that is to say, if a *net,* rather than a *gross,* scale is used). (Affidavit of Francis M. Neall, Transcript of Record, pages 44, 45 and 46.)

5. The difference in price resulting from these two formulae for computing costs amounts to upwards of $35,000.00 with respect to the logs delivered up to the time this action was commenced, and will steadily increase with further deliveries so long as operations continue under the contract. (Complaint, paragraph XII; Transcript of Record, page 14.)

6. The parties have expressly agreed that "the execution, operation, performance and all other matters pertaining to this contract shall be construed under and governed by the laws of the State of California". (Contract, paragraph 14; Transcript of Record, page 30.)

7. The full text of the arbitration provision in the contract is as follows:

> "It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."
>
> (Contract, paragraph 10; Transcript of Record, page 29.)

8. There is conflict in the record concerning at which party's instance there was included in the arbitration provision the saving clause reading:

> "* * * but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

The affidavit of Francis M. Neall states that such saving clause was inserted at the instance and insistence of Raymond T. Heilpern, who acted as counsel for appellee United States Plywood Corporation in the negotiation of the contract. (Transcript of Record, pages 44, 46.)

To the contrary, the affidavit of said Raymond T. Heilpern asserts that such saving clause was inserted at the instance of said Francis M. Neall, purportedly as the result of Mr. Neall's conference with the New York counsel for appellant Hudson Lumber Company. (Transcript of Record, pages 49-51.)

9. Whichever of these two gentlemen is correct in his recollection of the negotiations, Mr. Heilpern's affidavit on behalf of appellees states, among other things, as follows:

> "In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. He stated that if United States Plywood Corporation were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration proceedings would not afford an adequate remedy to prevent such injury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury." (Transcript of Record, pages 50-51.)

10. If appellees rescind or cancel the contract or declare forfeit appellants' rights thereunder (that is to say, if appellees refuse further deliveries of cedar logs under the contract) by reason of appellants' failure to pay the larger amounts claimed by appellees and

by reason of appellees' contention that appellants would thereby breach the contract, and that further performance by appellees was thereby excused, appellants will lose a large investment in sawmill facilities in the vicinity of the timber supply, and will lose an assured supply of timber in excess of twelve years' supply. (Complaint, paragraph XIV; Transcript of Record, pages 15-16.)

11. Appellants face the danger of multiplicity of actions and proceedings unless the controversy is determined. (Complaint, paragraph XIV; Transcript of Record, pages 15-16.)

12. Appellees, prior to the commencement of this action, expressly declared that despite any arbitration proceedings they would insist on appellants' paying, pending the arbitration, the amounts claimed by appellees to be due. (Affidavit of Francis M. Neall, and letter therein set forth, from counsel for appellees to counsel for appellants; Transcript of Record, pages 44, 47-48.)

13. Appellants are ready, able and willing to do equity and to perform the contract as the Court shall interpret it. (Complaint, paragraph XVI; Transcript of Record, page 17.)

POINTS AND AUTHORITIES.

I. WHAT LAW GOVERNS THE CASE.

A. THE ARBITRATION AGREEMENT, BEING REMEDIAL, IS GOVERNED BY FEDERAL LAW.

The case being now in the Federal Courts, the laws of the United States control the proceedings, so far as remedial questions are concerned. (*Parry v. Bache* (1942), 125 F. 2d, 493, 495.) This includes the validity and construction of the arbitration provision, which goes to the remedy. (*Parry v. Bache, supra; Pioneer Trust & Savings Bank v. Screw Machine Products Co.* (1947) 73 F. Suppl. 578.)

B. IN APPLYING THE FEDERAL LAW CONCERNING THE REMEDY TO THE CIRCUMSTANCES HERE PRESENT, AMONG SUCH CIRCUMSTANCES TO BE CONSIDERED IS THE STATE OF THE SUBSTANTIVE RIGHTS OF THE PARTIES UNDER THE CONTRACT, WHICH SUBSTANTIVE RIGHTS ARE GOVERNED BY CALIFORNIA LAW.

In applying the Federal remedial law (the United States Arbitration Act, Title 9 U. S. C. A. Section 3) to the circumstances of this case, we shall find that we must determine whether there is here an "issue referable to arbitration under an agreement in writing for such arbitration", as the Arbitration Act puts it. We shall see that this question depends on whether the "agreement in writing" binds the parties to arbitrate this kind of controversy, or whether the provision in such agreement saving to the parties the right to "seek injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement" applies here. That problem of construction will involve some consideration of what are the substantive rights

of the parties under the contract as construed by the law governing such substantive rights. To that extent we must examine and apply the law of the state. (*Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 82 L. ed. 1188, 58 Sup. Ct. 817; *Ruhlin v. N. Y. Life Insurance Co.* (1937) 304 U. S. 202, 82 L. ed. 1290, 58 Sup. Ct. 860.) The state whose law is to be so applied in this case is California, not only because the contract so provides (Contract, paragraph 14, Transcript of Record, page 30); but also because it is the state in which the District Court sits (*Klaxon Company v. Stentor Electric Manufacturing Co., Inc.* (1941) 313 U. S. 487, 85 L. ed. 1477, 61 Sup. Ct. 1020; *Griffin v. McCoach* (1941) 313 U. S. 498, 85 L. ed. 1481, 61 Sup. Ct. 1023).

II. THE FEDERAL STATUTE HERE APPLICABLE CONTEMPLATES THAT FOR A STAY OF PROCEEDINGS TO BE ORDERED THERE MUST BE SHOWN AN "ISSUE REFERABLE TO ARBITRATION UNDER AN AGREEMENT IN WRITING FOR SUCH ARBITRATION".

The pertinent portion of the United States Arbitration Act (Title 9 U. S. C. A., Section 3) applicable here, provides as follows:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had

in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration".

III. THE CONTROVERSY DISCLOSED IN THE COMPLAINT IN THIS ACTION IS NOT AN "ISSUE REFERABLE TO ARBITRATION UNDER AN AGREEMENT IN WRITING FOR SUCH ARBITRATION".

A. ARBITRATION CONTRACTS (LIKE OTHER CONTRACTS) ARE TO BE CONSTRUED IN THE LIGHT OF THE INTENTION OF THE PARTIES, AND NO ONE IS BOUND TO ARBITRATE BEYOND THE POINT TO WHICH HE HAS EXPRESSED HIS WILLINGNESS TO DO SO.

While the New York law is not controlling here, we quote the language of Mr. Justice Cardozo, written when he was still on the New York Court of Appeals, in *Marchant v. Mead-Morrison Mfg. Co.* (1929) 252 N. Y. 284, 169 N. E. 386, 391, which we submit as at least persuasive authority, not only because of the substantial similarity of the New York and Federal arbitration statutes (see Appendix), but also because of the high authority of its writer.

> "Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention. . . . There is nothing in the law, however, that exacts a submission so sweepingly inclusive. *The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to*

be to the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." (Italics supplied.)

B. TO ASCERTAIN THE INTENT OF THE PARTIES HERE WE MUST CONSIDER TWO APPARENTLY INCONSISTENT PROVISIONS.

1. **All disputes to be submitted to arbitration.**

The contract states in language which, if standing alone, could hardly seem plainer: ". . . in case any disagreement or difference shall arise at any time hereafter . . . in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration. . . ." (Contract, paragraph 10. Transcript of Record, page 29.) That is not all of it, however.

2. **But nothing shall preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach.**

Having used a clear and sweeping arbitration clause, the parties then added to it the clause which gives an entirely different meaning to the arbitration agreement: ". . . but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement."

First: All disagreements must be arbitrated; *but, then:* the parties retain their right to bring equitable

actions for injunctive relief to prevent "irreparable injury by reason of a claimed breach". If the original language is considered alone, there can be no situation in which resort to the courts can be had, for *any disagreement or difference, either as to construction or operation of the contract, or the respective rights and liabilities of the parties* is to be arbitrated. That covers everything. There simply is no justiciable controversy that is not embraced within the literal meaning of that broad language.

The parties, however, could not have meant that literally, because they added the above-quoted words which show unmistakably that they intended to preserve their rights of access to the courts in some instances at least.

C. APPARENTLY INCONSISTENT OR CONFLICTING PROVISIONS IN A CONTRACT MUST BE READ TOGETHER SO AS TO RECONCILE THEM IF REASONABLY POSSIBLE, GIVING EFFECT TO ALL.

It is one of the best established rules of contract law that apparently conflicting provisions of a contract should be reconciled, *if that can be done by any reasonable construction of the contract;* and that a provision must not be disregarded as inconsistent with other provisions *unless no other reasonable construction thereof is possible.*

See:

F. W. Woolworth Co. v. Peterson (1935) 78 F. 2d 47;

P. W. Brooks & Co. v. North Carolina Public Service Co. (1930) 37 F. 2d 220;

Norwich Union Indemnity Co. v. H. Kobacker & Sons Co. (1929) 31 F. 2d 411, 87 A. L. R. 1069;

Linde Dredging Co. v. Southwest L. E. Myers Co. (1933) 67 F. 2d 969;

Cities Service Gas Co. v. Kelly-Dempsey & Co. (1940) 111 F. 2d 247;

Carpenter v. Continental Casualty Co. (1938) 95 F. 2d 634;

Retsloff v. Smith (1926) 79 Cal. App. 443, 249 Pac. 886;

Wilson v. Coffey (1928) 92 Cal. App. 343, 268 Pac. 408; and

Coast Counties Real Estate and Investment Co. v. Monterey County Water Works (1929) 96 Cal. App. 269, 274 Pac. 415.

While it is true that if two inconsistent provisions in a contract are utterly and irreconcilably repugnant, then, as a general rule, the first will be given effect and the latter will be rejected. *(Du Puy v. U. S.* (1929) Court of Claims, 35 F. 2d 990; *Burns v. Peters* (1936) 5 Cal. 2d 619, 623; 55 Pac. 2d 1182), it has been said that this rule should be applied "only as a last resort". (See *Crescente v. Vernier* (1949) 53 N. M. 188, 204 Pac. 2d 785, 790.)

D. IN EXPLAINING AMBIGUITIES AND RECONCILING APPARENTLY CONLICTING PROVISIONS IN A CONTRACT, RESORT MAY BE HAD TO EVIDENCE OUTSIDE THE CONTRACT, TO EXPLAIN THE INTENTION OF THE PARTIES, INCLUDING EVIDENCE OF THE NEGOTIATIONS LEADING TO ITS EXECUTION.

When the meaning of a contract is not certain on its face because of conflicts between its various portions, then: "As an aid in discovering the all-important element of intent of the parties to the contract, the trial Court may look to the circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . . and the preliminary negotiations between the parties . . ." (*Universal Sales Corporation, Ltd. v. California Press Manufacturing Company* (1942) 20 Cal. 2d 751, 761, 128 Pac. 2d 665, 671.)

See also:

Balfour v. Fresno Canal & Irrigation Co. (1895) 109 Cal. 221, 226; 41 Pac. 876, 877;

Jegen v. Berger (1946) 77 C. A. 2d 1, 8; 174 Pac. 2d 489, 494;

Ryan v. Ohmer (1917) 244 Fed. 31, 34; 156 C. C. A. 459.

E. THE EVIDENCE PRODUCED BY APPELLEES CONCERNING THE NEGOTIATIONS LEADING UP TO THE EXECUTION OF THE CONTRACT GIVES AN EXPLANATION OF THE MEANING OF THE SAVING CLAUSE IN THE ARBITRATION PROVISION WHICH POINTS THE WAY TO INTERPRETATION AND RECONCILIATION OF THE APPARENTLY INCONSISTENT CLAUSES.

There is a conflict in the evidence concerning at which party's instance there was inserted in the arbitration provision the clause reading: ". . . but nothing

herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement." (See affidavit of Francis M. Neall, Transcript of Record, pages 44-48; and of Raymond T. Heilpern, Transcript of Record, pages 49-51.)

That becomes immaterial, however, because even if we assume for purposes of argument that Mr. Heilpern's recollection of the negotiations is the correct version, the rule construing a contractual provision against its draftsman is of no consequence here; because from the words of appellees' own witness, Mr. Heilpern, we have an explanation of the meaning of this saving clause. He stated in his affidavit (Transcript of Record, pages 50-51) as follows:

> "In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. *He stated that if United States Plywood were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration proceedings would not afford an adequate remedy to prevent such injury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury.*" (Italics supplied.)

F. UPON APPLYING THE ABOVE PRINCIPLES, AND THE ABOVE EXPLANATION OF THE MEANING OF THE SAVING CLAUSE IN THE ARBITRATION PROVISION ASSERTED BY APPELLEES' OWN WITNESS, THE MEANING OF THE WHOLE ARBITRATION PROVISION TAKES SHAPE.

1. In any situation where the seller might wrongfully refuse or threaten to refuse to continue deliveries of logs, and buyer should claim that seller was or would be thereby breaching the contract, buyer was not content to rely on arbitration to give it adequate relief, but insisted on reserving its right to seek the aid of a court of equity.

This construction seems inescapable. If at any time the seller should "divert" the cedar logs from buyer's mill, buyer would not be satisfied with arbitration process, but because of the irreparable injury that would result from such "diversion" insisted on retaining the right to "injunctive relief" (which is equivalent to saying "suit in equity for the kind of relief which courts of equity give").

(a) In This Event, Actual Diversion (or Failure or Refusal to Deliver Logs) Would Not Be Necessary, But a Threat or Reasonable Fear of It Would Give Rise to the Right of Action.

Injunctive process is historically a remedy designed at least as much to prevent threatened injury as to stop injury in process. The words "injunctive relief" in the saving clause in question are not limited. There is nothing in the clause that indicates an intention to restrict the right of "injunctive relief" to cases where the injury has already occurred or is in process. Indeed, the words "to *prevent* irreparable injury" carry inevitably the thought of injunction against a *threatened* injury before it occurs. (See *Morris* v. *Iden* (1913) 23 Cal. App. 388, 138 Pac. 120, where the

Court enjoined a threatened breach of a lease by the lessor before it occurred; *Farnum v. Clarke* (1906) 148 Cal. 610, 84 Pac. 166, where threatened breach of a contract was enjoined.

(b) This Right to Injunctive Relief Against a Threatened Breach of a Contract Is Established If Irreparable Injury Would Result From the Breach, Even in Cases Where the Contract May Not Be Specifically Enforced; and Is Even More Clearly Recognized Where the Contract Is Specifically Enforcible.

As the Court said in *Morris v. Iden* (supra, 23 Cal. App. 388, 395-6) (after referring to the usual rule that breach of a contract which is not specifically enforcible will not be enjoined):

> "We believe, however, that the present case comes within the exception to the general rule which has been recognized in many cases. But a little over two months of the term of three years of the tenancy had elapsed when the defendants advertised for sale the personal property mentioned in the lease and thus threatened to do an act which, in view of the character of the business for which the property was to be used, would practically result in terminating the lease and so destroying the rights of the plaintiff thereunder. Obviously, the plaintiff was without a complete and adequate remedy in the ordinary course of law, for it would be impossible, under the circumstances, to estimate, except by mere conjecture, the damage he would suffer if the trespass threatened by the defendants was consummated. Upon this ground he is entitled to the protection of the injunctive jurisdiction of a court of equity, notwithstanding the want of that mutuality in

the contract necessary to authorize the specific enforcement of its terms. In *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699 (75 Pac. 329), and in other cases therein cited, the right to an injunction in a certain class of cases to prevent the violation of contracts which cannot be specifically enforced is distinctly recognized and put upon the ground of a want of an adequate remedy at law."

And in *Lane Mortgage Co. v. Crenshaw* (1928) 93 Cal. App. 411, 431; 269 Pac. 672, 681, in answering a contention that a contract, asserted to be one for personal services, was not specifically enforcible, and that therefore its breach would not be enjoined, said:

"While we do not hold that the contract in question is or could be specifically enforced, deeming that unnecessary to the decision, it is a settled rule of equity that the lack of this capability does not preclude a court from decreeing injunctive relief."

And in *Griffin v. Oklahoma Natural Gas Corporation* (1930) 37 F. 2d 545, 549, the Court of Appeals for the Tenth Circuit said:

"An injunction against the breach of a contract is a negative decree of specific performance. The power and duty of a court of equity to grant such injunction is broader than its power and duty to grant a decree of specific performance, since an injunction to restrain acts in violation of a lawful contract will be granted even when specific performance would be denied because of the nature of the contract."

And in *Roof v. Conway* (1943) 133 F. 2d 819, 826, the Court of Appeals for the Sixth Circuit said:

> "It is well understood that a United States court of equity will not entertain a suit for injunctive relief, unless it be shown that the suitor has no plain, adequate and complete remedy at law. In invariably applying this truism the Federal courts not only follow a long established principle of equity, but bow to the plain inhibition of the declaratory statute, Judicial Code, Sec. 267, U. S. C. A. Title 28, Sec. 384. *The converse is likewise true. Where there is no plain, adequate and complete remedy at law, a Federal court will award injunctive relief in appropriate setting.*" (Italics supplied.)

And where the contract, breach of which is threatened, is specifically enforcible, it is clear that its breach is enjoinable. (See *Farnum v. Clarke* (1906) 148 Cal. 610, 620-21; 84 Pac. 166.)

2. **The other portion of the arbitration clause, providing generally for arbitration of disputes, must, on the other hand, be restricted in its application to those areas of disagreement as to facts where actual breach or repudiation of the contract is not the issue involved.**

In view of the above mentioned statement by appellees' witness, Mr. Heilpern, as to the purpose of the clause saving the right to injunctive relief (Transcript of Record, pages 50-51), and of the principles of construction above referred to, which require reconciliation of apparently inconsistent provisions if possible: we must consider the meaning, scope and extent, not only of the saving clause (as we have done

next hereinabove) but also of the general arbitration provision. We are bound by the same principle of construction to reconcile this general arbitration clause with the particular saving clause, if possible. We cannot disregard it, any more than we would concede that appellees may disregard the saving clause retaining the right to "injunctive relief". It is there. The parties left it in the agreement in spite of their intention that "diversion" of logs, causing irreparable injury, would be *enjoinable* and *not arbitrable*. It means something.

Logic compels us to the conclusion that this general arbitration clause applies to all other situations not covered by the saving clause. It applies, that is, to all situations of disagreements other than those involving the issue of a threatened or actual repudiation of the contract.

(a) That Is to Say, in Effect, That Wherever Disputes as to Pure Matters of Fact Are Concerned, the Rights of the Parties in the Light of Those Facts Being Undisputed, Arbitration Is the Method by Which Those Facts Are to Be Determined.

Let us suppose that the parties were in complete agreement as to the main issue on the merits in this controversy, that is, as to whether common cost of the logs of all species were to be determined *before* or *after* deduction for visible defects (*gross* or *net* scale). Let us suppose that instead of that being the issue, (as it is), the parties were in complete agreement that net scale was to be used and that such was the true meaning of the contract. Let us then suppose that a dispute arose, not as to the *meaning* or *legal inter-*

pretation of the contract, but as to a pure question of *fact,* namely: how many thousand feet of logs (so measured on net scale) had been delivered. Such a dispute would seem to be in the area left to arbitration.

(b) On the Other Hand, Legal Questions, or Mixed Questions of Law and Fact, Directly Affecting the Liability of the Parties to Proceed With the Contract, Are Not Arbitrable, But Remain Justiciable.

But where any legal question, or a mixed question of law and fact (such as one involving interpretation of the meaning of the contract) arose, the determination of which directly affected and governed the right of one party or the other to repudiate or go on with the performance of the contract; then the controversy would be beyond the scope of the so-called "arbitration", and was reserved to litigation in the Courts, *at least in those cases not involving mere suits at law for damages or money payments, but rather, equitable actions to prevent complete forfeiture of rights or irreparably injurious breach.*

(c) In Short, by Reason of the Addition of the Saving Clause Reserving the Right to Injunctive Relief, the "Arbitration" Referred to in the General Clause Is No Longer Unlimited Arbitration of All Disputes of Every Kind, But Is Limited to Fact Finding in Issues Not Directly Threatening Forfeiture of the Contract; That Is, the "Arbitrators" Are in the Nature of "Appraisers", or "Measurers".

We submit that while the word "arbitration" is used in the contract, its meaning is reduced, by the addition of the saving clause, to "appraisal" or "fact finding".

The case of *Rives-Strong Building, Inc. v. Bank of America N. T. & S. A.* (1942) 50 C. A. 2d 810, 123 Pac. 2d 942, is of interest in this connection. There, a lease contained a provision for renewal of the term at a rental (if not agreed on by the parties) to be fixed by "arbitration". The parties being unable to agree on the renewal rent, a so-called "arbitration" was had, and upon the award being made, one party brought action to nullify the award on the ground that certain procedural requirements of the statutes relating to arbitration had not been followed. The trial Court nullified the award on such ground. On appeal the District Court of Appeal reversed, and upheld the award, on the basis that it was not true "arbitration" but rather "appraisal", and was not governed by the statutory rules relating to true arbitration.

After reviewing the authorities establishing the clear distinction between true "arbitration" and "appraisal", the Court said (50 C. A. 2d 817):

> "Turning to the lease itself to determine what the parties intended, we find a very simple wording, with no conditions or restrictions placed upon the persons named, no method of procedure suggested and no hearings or notices mentioned. In fact, the provision is so aptly worded for the purpose of requiring a mere appraisal or valuation that if the word 'appraiser' is substituted for the word 'arbitrator' in the lease no serious contention could be made that the parties intended it to be a statutory arbitration agreement. The use of the word 'arbitrator' is of course not controlling".

And this Court itself has declared this same distinction between "arbitration" and "appraisal".

In *Luedinghaus Lumber Co. v. Luedinghaus* (1924) 299 Fed. 111, the parties made a timber contract which provided among other things that if there should be less than 100 million feet of timber on the land, the seller should be required to buy and make available additional land to the buyer to make up the shortage. The amount of timber was to be determined by cruisers employed by the respective parties, who should in turn select a third.

Litigation and cross litigation was commenced, claiming breach of the contract on both sides. One of the issues was whether a cruise made, purportedly pursuant to the contract, was conclusive on the parties.

It appears that at that time, before the United States Arbitration Act, executory agreements for arbitration were considered abrogable; and the District Court ruled that the provision for the cruise was a provision for "arbitration", and as such, was subject to abrogation by the parties. This Court, while it concluded that the cruise and appraisement had not been made in accordance with the contract, and was therefore not conclusive, nevertheless pointed out that the provision in question was not one for "arbitration" but for "appraisal" or "measurement". Hence, it was not abrogable as an agreement for "arbitration", but enforcible as one for a method of appraisal.

This Court said (299 F. 113):

> "We are unable to agree with the court below that the provision in the contract for the deter-

> mination of the amount of timber on the lands was an agreement to arbitrate a dispute should one arise between the parties, or that the agreement and the question of its revocability are determinable by the rule of the common law as to arbitration and award. Arbitration presupposes a dispute and is a recognized common-law method of settling disputes and controversies. If there is no matter in dispute there is no question for arbitration. . . . *There is a broad distinction between a submission to arbitration and a provision for incidental appraisement or measurement*". (Italics supplied.)

While the arbitration provision in the present case is not so clearly limited to "appraisal" or "measurement" as it was in these two cases next above cited, we submit that to limit it to this meaning reconciles the two apparently inconsistent provisions, gives effect to both, gives meaning to all of paragraph 10 (Transcript of Record, page 29), and is reasonable.

G. APPLYING THE INTERPRETATION OF THE "ARBITRATION" PROVISION THUS DEVELOPED TO THE FACTS SHOWN BY THE RECORD HERE, THIS ACTION FALLS WITHIN THE CATEGORY OF THE SAVING CLAUSE RESERVING THE RIGHT TO INJUNCTIVE RELIEF, RATHER THAN THE CATEGORY OF ARBITRABLE DISPUTES; AND THE ISSUES HEREIN ARE THEREFORE NOT "REFERABLE TO ARBITRATION UNDER AN AGREEMENT IN WRITING FOR SUCH ARBITRATION", SO AS TO JUSTIFY A STAY.

The phrase "irreparable injury by reason of a claimed breach of this agreement" (Transcript of Record, page 29) requires analysis. This wording fits either of two cases: (1) where the *plaintiff* claims that

the *defendant* is about to breach the contract and seeks to enjoin the defendant from doing so on the ground that the threatened breach will result in irreparable injury to the plaintiff; and (2) where the *plaintiff* fears that the *defendant* is about to take steps, such as rescission or cancellation, based on *defendant's* claim that *plaintiff* has breached the contract. The wording of the saving clause applies with equal force and logic to either situation.

Here the complaint shows that the parties are in dispute over the method of computing the price of the logs, which is based on their *"actual cost"*. (Transcript of Record, pages 12-14.) Appellants (purchasers) face the danger of forfeiture through rescission or cancellation by appellees (sellers) on the basis of appellees' claim that appellants have breached the contract. (Complaint, paragraphs XIII and XIV, Transcript of Record, pages 15-16.) Appellees have asserted through their counsel the right to "insist" on prompt payment of the balances due computed according to their theory, even pending arbitration. (Letter from Mr. Heilpern, set forth in affidavit of Francis M. Neall, Transcript of Record, pages 47-48.)

In the face of that declared position, arbitration will not save appellants from legal reprisals by appellees while it is going on. The dilemma faced by appellants requires them to choose between paying appellees' demands or facing the clear and threatened danger of purported cancellation or rescission by appellees based on their claim that appellants have

breached the contract. Such a refusal to deliver logs would be a "diversion" of them as contemplated in the negotiations leading up to the insertion of the saving clause. (Transcript of Record, pages 50-51.)

The letter from Mr. Heilpern (Transcript of Record, pages 47-48) was not idly written. A prudent man acting with due diligence and concern for the affairs of his business, on receiving such a letter must infer from it unmistakably a threat that the defendants will seek any legal remedy available, as on a breach, unless, *despite a pending arbitration*, appellants abide by appellees' construction of the contract.

In the face of that declared position, arbitration will not save appellants from legal reprisals by appellees while it is going on.

We submit that such a situation is the very kind of case to which the saving clause reserving the right to seek injunctive relief was intended to apply.

If appellees, under an erroneous interpretation of the disputed provisions of the contract concerning the method of determining actual logging cost, attempt to declare appellants' rights forfeit, or purport to cancel or rescind (that is to say, if they "divert" the logs elsewhere and refuse to deliver them under the contract); then any act of appellees denying appellants' right to deliveries under appellees' interpretation of the contract will be a breach thereof by appellees. In the final analysis, then, what appellants seek is to prevent appellees from committing a threatened breach of the contract.

As we have shown above threatened breach of a contract may be enjoined, even in some instances where specific performance would not be decreed, if irreparable injury be shown; and clearly where specific performance would be decreed. Even though the contract in question concerns personal property it may be specifically enforced if inadequacy of the legal remedy be shown. (See *Korabek v. Weaver Aircraft Corporation* (1944) 65 C. A. 2d 32, 149 Pac. 2d 876.)

The complaint shows that if appellants are deprived of the deliveries under the contract they will lose not only their substantial investment in a sawmill in the vicinity, but also an assured supply of cedar timber for upwards of twelve years, and will face the incidental harassment and undeterminable expense of various actions and proceedings, including arbitration. How can the legal damages resulting from the loss of a supply of cedar timber suitable to pencil manufacture be ascertained? Such a question is in the field of conjecture and guesswork. No damages that may be awarded could be said with any confidence to be adequate or to bear any relation to events as they may turn out over the next twelve years or more.

H. THIS ACTION FOR AN INJUNCTION AGAINST BREACH BY UNWARRANTED REPUDIATION OF THE CONTRACT BEING JUSTICIABLE AND NOT ARBITRABLE ALL PROPER INCIDENTAL REMEDIES CAN BE ASKED, INCLUDING THE REMEDY OF DECLARATORY RELIEF INCIDENTAL TO ACTIONS IN EQUITY, AND ALSO INJUNCTION AGAINST THE UNWARRANTED ARBITRATION ITSELF.

At the hearing before the District Court counsel for appellees made much of the contention that this is an

action to enjoin arbitration proceedings, and that we are begging the question, or lifting ourselves by our own boot straps, by seeking to enjoin arbitration and *thereby* establish this as an action for injunctive relief.

That, however, is not our purpose or our claim. We assert, primarily, the right to have appellees enjoined from wrongfully breaching the contract by refusing deliveries under it, in reliance on their claim of right to forfeit, or cancel or rescind because of their incorrect contention that we have breached it.

If, as we believe, we have hereinabove established appellants' right to such an injunction, then a court of equity may take complete control of the case. If it deems it proper to enjoin such threatened breach by appellees, it may go further and exercise its equitable jurisdiction fully, giving all proper incidental remedies warranted by the exigencies of the case. This includes the giving of declaratory relief. Furthermore, if we have succeeded in establishing that this primary issue of injunction against breach of the contract is a matter for judicial determination, rather than arbitration, and that such issue is not "referable to arbitration", then any attempt by appellees to force appellants to arbitrate such an issue when they are not required to, is itself a cause of irreparable injury if it succeeds. It would subject appellants to expense and trouble unjustifiably by making it necessary for them to defend their contentions before arbitrators. It would thereby subject them to multiplicity of suits. And it would appear to be a truism that if one is

wrongfully deprived of his day in Court and of his right to appeal to the Courts to seek redress of wrongs, he is irreparably injured.

We are not seeking to beg the question by seeking "injunctive relief" against arbitration and *thereby* bring the case within the non-arbitrable category. We are rather establishing it as a case justifying injunction against breach of the contract ("injunctive relief to prevent irreparable injury"), in which event it is established as a non-arbitrable controversy; whereupon as an incident to the main relief sought, we ask also for relief from the harassment of unwarranted and unrequired arbitration.

IV. EVEN IF THE CONTROVERSY DISCLOSED IN THE COMPLAINT HAD ORIGINALLY BEEN AN "ISSUE REFERABLE TO ARBITRATION", IT IS SO NO LONGER, BECAUSE APPELLEES' CONDUCT, BEING INCONSISTENT WITH IT, HAS WAIVED WHATEVER RIGHT THEY ORIGINALLY MAY HAVE HAD TO COMPEL ARBITRATION.

As above stated, the United States Arbitration Act (Title 9 U. S. C. A., Sect. 3) requires that on an application for a stay it must be shown that the applicant for the stay is not in default in proceeding with arbitration.

A Federal Court is vested with discretionary power, under the Act, to deny arbitration on the ground that the party requesting it is himself in default in proceeding with it. (*La Nacional Platanera S. C. L. v. North American Fruit & Steamship Corporation* (1936) C. C. A. 5th, 84 F. 2d 881.)

Conduct of a party so inconsistent with arbitration as to evidence a waiver of it, would be a "default in proceeding with such arbitration".

One who by his conduct prevents or seeks to prevent the parties from remaining *in statu quo* pending arbitration, is not entitled to plead an arbitration clause as a bar to an action in the Courts. See *Winsor v. German Savings & Loan Soc.* (1903) (Washington) 72 Pac. 66. In that case the lessee of hotel property sued to enjoin interference with his use of an archway between the leased property and adjoining property by the occupant of the adjoining property, under a party wall agreement executed between former owners of the adjoining buildings. The party wall agreement contained a provision binding the parties to arbitrate future disputes. The defendant raised by demurrer the defense that plaintiff could not maintain the action without first arbitrating. The Court rejected this defense on the ground that the defendant, having barred the archway and deprived plaintiff of the use of the hallway, elevator and stairway, had waived the arbitration clause. The Court said, at page 67:

> ". . . they at least by these acts have waived the arbitration clause in the agreement, and can not now be heard to say that 'we are in possession wrongfully, but, before you have any rights which may be enforced, you must propose an arbitration, and then, if we refuse, you may resort to the courts for redress.' *An agreement for arbitration necessarily implies that the property over which the dispute arises must remain in statu quo pending the arbitration . . .*" (Italics supplied.)

When a party has taken action inconsistent with an arbitration, he will be deemed to have waived his right to arbitration. See *Young v. Crescent Development Co.* (1925) 240 N. Y. 244, 148 N. E. 510. There, arbitration of a damage suit by a contractor against an owner was denied upon two grounds, the first (immaterial here) being that an action for damages based on breach was not arbitrable, since that particular clause was intended to cover other situations; the second ground being that by filing a mechanic's lien claim, and thereby taking action inconsistent with an arbitration, the contractor had waived it. The rule of this *Young* case, insofar as it concerned mechanics' liens specifically, was changed by statute in New York in 1929, by addition of Sect. 35 to the New York Lien Law (McKinney's Consolidated Laws of New York, Book 32, Liens, Sect. 35), providing in part: "The filing of a notice of lien shall not be a waiver of any right of arbitration . . .". The principle for which the case is cited here, however, is not impaired by the statutory change—only its application to a particular situation.

In this case, the appellees, by the letter from their counsel above referred to (Transcript of Record, pages 47-48), have insisted that, pending arbitration, the payments by appellants be made according to appellees' interpretation of the contract. The letter contains a thinly veiled threat to avail themselves of other legal remedies if such payments are not kept up. This is certainly not leaving the parties *in statu quo*. This is conduct inconsistent with a disposition to arbitrate. The

appellees are just as much bound by the arbitration clause as are the appellants. If appellants were to default (which they contend they have not and do not intend to), appellees on their part could not bring any action or exercise any other legal remedies without being in the teeth of the arbitration clause, unless exempted therefrom by the saving clause reserving the right to "injunctive relief" upon which appellants rely herein. Appellees' tacit threat contained in their counsel's letter, while it is an attempt to protect their interests, is analogous to the act of the contractor in the *Young* case (supra) in filing a mechanic's lien to protect his claim pending arbitration. It is like the act of the defendant in the *Winsor* case (supra), in closing up the disputed archway while calling for arbitration of the question whether he had the right to do so. Appellees can not blow hot and cold. They either stand on their claimed right to arbitration, or they abandon it. If they arbitrate they must preserve the *status quo.* This, it appears from their counsel's letter, they are not willing to do. Having evidenced this intent, they must now be taken to have waived arbitration. If they have so waived it, they can not change their minds and demand it as a condition precedent to these Court proceedings. That point was declared by the New York Court of Appeals in the *Young* case (supra).

Since we have relied herein on some New York cases; and since the California law and decisions are necessarily involved here, as well as the United States Arbitration Act, we are setting forth in an Appendix

hereto, the pertinent portions of the Federal, California and New York statutes relating to arbitration, to show their substantial similarity.

For the reasons herein stated we respectfully submit that the portion of the Order of the District Court appealed from granting a stay pending arbitration, should be reversed, and the motion of appellees for a stay be ordered denied.

Dated, Oakland, California,
February 15, 1950.

Respectfully submitted,
BRUNER & GILMORE,
McKEE, TASHEIRA & WAHRHAFTIG,
RIDLEY STONE,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

UNITED STATES ARBITRATION ACT, U.S.C.A., TITLE 9, SECTION 3.

Pertinent Portions:

Stay of proceedings where issue therein referable to Arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

CALIFORNIA CODE OF CIVIL PROCEDURE.

Pertinent Portions:

Section 1280.

Validity of arbitration agreements. A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, or an agreement in writing to submit an existing controversy to arbitration pursuant to section 1281 of this code, shall be valid, enforceable and irrevocable, save

upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, the provisions of this title shall not apply to contracts, pertaining to labor.

Section 1284.

Stay of civil action. If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration.

NEW YORK CIVIL PRACTICE ACT, ARTICLE 84.

Pertinent Portions:

(The former Arbitration Law, constituting Chapter 72, Consolidated Laws, appears to have been superseded, in 1937, by a substantially similar enactment constituting Article 84 of the Civil Practice Act. See Clevenger's Practice Manual, 1949.)

Section 1448.

Validity of arbitration contracts or submissions. Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or

more arbitrators any controversy existing between them at the time of the submission which may be the subject of an action, *or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties.

A controversy *cannot be arbitrated,* either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness

unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission *or contract* has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

The second subdivision of this section does not prevent the *arbitration* of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

Section 1449.

Form of contract or submission. A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

Section 1451.

Stay of proceedings brought in violation of an arbitration contract or submission. If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, the supreme court or a judge thereof, upon being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission.

(Italics in New York Statute included as shown in Clevenger's Practice Manual 1949. Presumably indicate new matter added by the recodification.)